UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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RAYMOND WRAY,

Plaintiff,

- against -

SALLY JOHNSON, Superintendent,
Orleans Correctional Facility,

Defendant.
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MEMORANDUM AND ORDER

96 CV 5139

APPEARANCES

For the Plaintiff:

Dawn M Cardi, Esquire
470 Park Avenue South
New York, New York 10016

For the Defendant:

Richard A. Brown
District Attorney of Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415
by: John M. Castellano and
Robin A. Forshaw,
Assistant District Attorneys

Weinstein, Senior United States District Court Judge:

Petitioner was convicted of two counts of Robbery, First Degree, one count of Criminal Possession of a Weapon, Second Degree, and one count of Criminal Possession of a Weapon, Third

Degree, and sentenced to a lengthy period of incarceration. He seeks a writ of Habeas Corpus. 28 U.S.C. § 2254. He claims that he was denied a fair trial because the trial court improperly permitted the use of a witness' out of court show-up identification testimony at trial.

Petitioner originally appealed to the Supreme Court of the State of New York, Appellate Division. That court found petitioner's various procedural challenges with regard to the manner in which the identification testimony was admitted to be without merit. See People v. Wray, 225 A.D.2d 718, 718-19, 640 N.Y.S.2d 122, 122-24 (N.Y.A.D.2d Dept. 1996), permission to appeal denied, 88 N.Y.2d 1025, 673 N.E.2d 1252, 651 N.Y.S.2d 25 (N.Y. 1996). As for his claim that the identification itself was unduly suggestive, the court agreed, finding, however, that any error as a result of the show-up testimony was not of such a magnitude as to warrant a new trial. See id.

Petitioner' procedural claims, including those relating to the timing of the hearing to suppress the identification testimony and the government's disclosure of its intent to use the out of court show-up evidence, as well as his assertion that the trial court failed to provide his trial counsel with the minutes of the suppression hearing, are not cognizable on habeas

review. They had no effect on the outcome of the case and violated no federal constitutional rights of petitioner.

As for the assertion that the show-up identification testimony was unduly suggestive, the government concedes error on this point and agrees that it should have been suppressed. Nonetheless, the weight of the remaining evidence against petitioner, including the other eyewitness testimony relating to the event, was strong. In addition, trial counsel was able to point up the weaknesses in the out of court identification by the witness and to demonstrate that neither that witness nor the complainant could identify petitioner in court as the assailant.

The error in the instant matter must be viewed as harmless, regardless of where the burden of persuasion rests. See O'Neal v. McAninch, 513 U.S. 432, 436-47 (1995); John M. Walker, Jr., Harmless Error Review in the Second Circuit, 63 Brook. L. Rev. 395, 396 ("the appropriate methods for determining whether an error is harmless are still evolving, and are not without controversy").

On the basis of submissions of counsel and petitioner, and transcripts of the proceedings before the state trial court, it can not be said that the challenged identification testimony had a "substantial and injurious effect or influence" on the jury's

verdict. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)(adopting test of Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

The petition is dismissed. A certificate of appeal is granted on the issue of whether the trial court's error in admitting the witness' out of court show-up identification testimony warranted a new trial on constitutional grounds.

SO ORDERED

Jack B. Weinstein
United States Senior District Court Judge

Dated: Brooklyn, New York
June 18, 1998